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J. Thompson Thornton

Aurora A. Ares

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THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: MISJOINDER, NONJOINDER, AND COLLUSIVE JOINDER

J. THOMPSON THORNTON* AND AURORA A. ARES**

I. INTRODUCTION

UNLIKE UNITED STATES airlines, foreign air carriers are often owned and operated by their respective national governments. Additionally, foreign state-owned commercial ventures participate in the business of commercial aviation by manufacturing aircraft engines and other components. It is, therefore, not unusual to see the joinder of a foreign government as the defendant in inter-

* J. Thompson Thornton is a partner in the law firm of Thornton, David, Murray, Richard and Davis, P.A. in Miami, Florida. Mr. Thornton has practiced in the field of aviation law since his graduation, with honors, from the Florida State University College of Law in 1982 where he served as the Editor-in-Chief of the Florida State University Law Review. Mr. Thornton specializes in the defense of aviation manufacturers, product liability, medical malpractice and personal injury litigation. He is a member of the Florida Bar Association and Member of the United States District Court for the Southern District of Florida Trial Bar as well as the United States District Court for the Middle District of Florida and United States Court of Appeals for the Eleventh Circuit.

** Aurora A. Ares is a litigator and appellate practitioner with the law firm of Thornton, David, Murray, Richard & Davis, P.A.

As lead appellate counsel, Ms. Ares won a unanimous victory in the United States Supreme Court in *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991), which held that passenger claims for pure emotional distress are not compensable in cases governed by the Warsaw Convention. Ms. Ares practices in the areas of constitutional law, medical malpractice, products liability, aviation and other commercial and international tort litigation. She received her law degree, with honors, from Florida State University, where she was a member of the Law Review. Ms. Ares is a member of the Florida Bar, the United States Supreme Court Bar, the United States Circuit Court of Appeals for the Eleventh and Third Circuits and the United States District Court for the Southern District of Florida.

national air crash litigation.¹

This article will examine the rules that govern the joinder of a foreign state in personal injury and wrongful death actions arising from aviation accidents. It will also examine how the joinder of a foreign state, even as third-party defendant, permits the removal of the entire case to federal court, including the first-party claims brought against private entities, and how such removal facilitates the dismissal of actions brought by foreign plaintiffs under the federal forum non conveniens standard. Finally, this article will note recent decisions on the law of fraudulent and collusive joinder, which further facilitate the joinder of the foreign state defendant, even when that joinder results in the removal of the action to federal court against the plaintiff's wishes.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

A discussion of tort litigation brought in the United States against a foreign state must begin with a discussion of the Foreign Sovereign Immunities Act of 1976 (FSIA or the Act).² The FSIA prescribes the subject matter jurisdiction of state and federal courts over actions brought against a foreign state or its agencies and instrumentalities³ and provides comprehensive procedures for such suits.⁴ The Act provides the sole basis for obtaining jurisdiction over foreign sovereigns in United States courts.⁵

¹ See, e.g., *Compañía Mexicana de Aviación, S.A. v. U. S. Dist. Ct.*, 859 F.2d 1354 (9th Cir. 1988).

² 28 U.S.C. §§ 1602-1611 (1988 & Supp. II 1990).

³ 28 U.S.C. § 1604 (1988).

⁴ Before the FSIA's enactment, foreign sovereigns sued in the United States requested that the State Department make a formal suggestion of immunity to the court. The FSIA was enacted to transfer the determinations of immunity from the political executive branch to the courts where determinations of immunity could be made "on purely legal grounds and under procedures that insure due process." H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.A.N. 6604-06. [hereinafter HOUSE REPORT].

⁵ *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989).

It codifies the "restrictive" theory of foreign sovereign immunity, extending immunity to cases arising from a foreign state's public acts but subjecting foreign states to suit in United States courts arising from a foreign state's commercial activity.⁶

III. MISJOINDER

United States courts will dismiss a foreign state that is joined with other private or domestic defendants in an action, if the foreign state is entitled to immunity under the FSIA.⁷ The joinder of a foreign state in air crash litigation in the United States is, therefore, preliminarily a function of the substantive question of whether one of the FSIA's exceptions to immunity applies to the claim against the foreign state.

A. EXCEPTIONS TO SOVEREIGN IMMUNITY

The FSIA prescribes exceptions to foreign sovereign immunity in suits based on a foreign state's commercial or private acts. Commercial activity is defined as:

[e]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.⁸

As the Act's drafters have noted:

[a] "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, *an airline* or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At

⁶ HOUSE REPORT, *supra* note 4, at 6613.

⁷ See, e.g., *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989). An exhaustive discussion of the FSIA's application is beyond the scope of this article. Therefore, this discussion will focus on the FSIA in cases involving personal injuries or property damage in the context of international aviation litigation.

⁸ 28 U.S.C. § 1603(d).

the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."⁹

In determining whether the act of a foreign state is commercial and not sovereign or public, an important factor is whether a private person could have engaged in similar conduct.¹⁰ In *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*¹¹ the Seventh Circuit Court of Appeals held that a foreign state's contract with United States health care providers to provide kidney transplants for Greek nationals was commercial and not sovereign in nature.¹² The court based its holding on the fact that private parties routinely enter into contracts to reimburse health care providers for medical services performed.¹³

1. The "Waiver" Exception

Structurally, the FSIA "starts from a premise of immunity, and then creates exceptions to the general principle."¹⁴ The first exception, which is seen in air crash litigation, involves the waiver of sovereign immunity and provides:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may pur-

⁹ HOUSE REPORT, *supra* note 4, at 6614-15 (emphasis added).

¹⁰ *Id.* at 6615.

¹¹ 877 F.2d 574 (7th Cir. 1989), *cert. denied*, 493 U.S. 937 (1989).

¹² *Id.* at 575.

¹³ *Id.* at 581.

¹⁴ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616. 28 U.S.C. § 1604 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (1988).

port to effect except in accordance with the terms of the waiver¹⁵

One court has held that a foreign state implicitly waives its sovereign immunity by signing a contract stating that it will be governed by the laws of the District of Columbia.¹⁶ Another has held that a foreign state implicitly waives its sovereign immunity by failing to raise the defense of sovereign immunity in its responsive pleading.¹⁷

2. Exceptions Based Upon "Commercial Activity"

The second exception to sovereign immunity involves actions arising out of the foreign state's commercial activity in or directed at the United States. This exception is divided into three subparts.¹⁸

a. An Action Based Upon Commercial Activity in the United States

The first of these commercial activity exceptions provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state."¹⁹ As defined by the Act, "[a]'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."²⁰ Therefore, taking this definition together with the first commercial

¹⁵ 28 U.S.C. § 1605(a)(1) (1988). The FSIA prescribes other exceptions to immunity, not discussed here, involving *inter alia*, cases in which rights in property are taken in violation of international law when there is some connection between such property and commercial activities of the foreign state in the United States and cases in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue. See generally 28 U.S.C. §§ 1605(a)(3)-(4), 1605(b), 1607, 1610, 1611 (1988).

¹⁶ *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703 (D.D.C. 1985).

¹⁷ *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 619 n.9 (S.D.N.Y. 1979).

¹⁸ 28 U.S.C. § 1605(a)(2) (1988).

¹⁹ *Id.*

²⁰ 28 U.S.C. § 1603(e) (1988).

activity exception to immunity, the clause would read as follows: a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on by such state and having substantial contact with the United States.

Despite this broad language, courts have read this exception narrowly, generally requiring that there be a "nexus" or "link" between the plaintiff's action and the foreign state's commercial activity in the United States.²¹ Consequently, a United States plaintiff who is injured in an air crash that occurs outside the United States on a flight unconnected to the United States cannot bring an action in the United States against the culpable foreign state-owned air carrier, even though that foreign state conducts substantial commercial aviation activity in the United States and even if it causes pecuniary loss or personal injuries to that United States resident.

For example, in *In re Disaster at Riyadh Airport*,²² plaintiff's decedent was killed in an inflight fire aboard a Saudi Arabian Airlines' flight between two cities in Saudi Arabia. The airline was wholly owned by the Kingdom of Saudi Arabia. Plaintiff's claim against the Kingdom was held not to fall within any exception to the immunity of the Kingdom, since the relationship between the negligent operation of the aircraft in Saudi Arabia and the commercial activity of the Kingdom in the United States was too attenuated to trigger the first commercial activity

²¹ The "nexus" test has been adopted by the Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits. See *Gemini Shipping Inc. v. Foreign Trade Org. for Chem. & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980); *Vencedora Oceancia Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195 (5th Cir. 1984); *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); see also *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *rev'd on other grounds*, 61 U.S.L.W. 4253 (U.S. Mar. 23, 1993) (concluding that in a claim resting "entirely upon activities sovereign in character, . . . jurisdiction will not exist under [the first clause of § 1605(a)(2)] regardless of any connection the sovereign acts may have with commercial activity").

²² 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981).

exception to foreign sovereign immunity.²³

Similarly, in *Kramer v. Boeing Co.*,²⁴ a United States citizen was injured when an engine caught fire on a Sabena Belgian World Airlines (Sabena) aircraft in the Republic of Cameroon. The defendant engine manufacturer, Pratt & Whitney (P&W), filed a third party complaint against Sabena, a "foreign state" under FSIA, alleging that Sabena negligently performed maintenance and service duties on the failed engine. The court found that "[t]he only nexus between the alleged negligence of Sabena and Sabena's commercial activities in the United States [was] that the engine part which [allegedly caused] the fire was purchased by Sabena from Pratt & Whitney in the United States."²⁵ The court held that the link to Sabena's alleged negligence was too attenuated to apply the commercial activities exception.²⁶

In another decision, *Tote v. Iberia International Airlines*,²⁷ the court held that United States courts had no jurisdiction over a wrongful death claim of a United States citizen arising from the crash of a domestic Spanish flight where the ticket was purchased in Spain.²⁸ In *Castillo v. Shipping Corp. of India*²⁹ there was no jurisdiction over a personal injury action brought against an Indian state-owned corporation by a citizen of the Dominican Republic that arose out of an accident occurring on the corporation's vessel in the Dominican Republic, even though the corporation carried on shipping activities having substantial contact with United States.³⁰

Therefore, it is only when the plaintiff's personal injury or wrongful death action has some specific nexus with the foreign air carrier's commercial activity in the United

²³ *Id.* at 17,881.

²⁴ 705 F. Supp. 1392 (D. Minn. 1989).

²⁵ *Id.* at 1395.

²⁶ *Id.* at 1395-96.

²⁷ 649 F. Supp. 41 (E.D. Pa. 1986).

²⁸ *Id.* at 43.

²⁹ 606 F. Supp. 497 (S.D.N.Y. 1985).

³⁰ *Id.* at 501-02.

States that the FSIA vests federal and state courts with subject matter jurisdiction. In *Sugarman v. Aeromexico, Inc.*,³¹ for example, the plaintiff, a United States citizen, alleged that an extended delay at Acapulco Airport caused him serious heart problems. The court held that the action had sufficient nexus with the foreign state-owned airline's commercial activity in the United States since the round-trip flight's return leg was bound for New York City and the airline tickets were purchased in New Jersey.³²

Similarly, in *Barkan v. General Administration of Civil Aviation of Peoples Republic of China*,³³ wrongful death actions were brought against the Civil Aviation Administration of the Peoples Republic of China, arising from the crash of a domestic flight in China. The Second Circuit Court of Appeals held that plaintiffs' actions had sufficient nexus with China's commercial activity in the United States. The Chinese Civil Aviation Administration had conducted substantial commercial aviation operations in the United States by employing ticketing agents in the United States and using passenger tickets for the flight, which were purchased in the United States through a ticketing agent of the Chinese agency.³⁴

Analogously, in *Nelson v. Saudi Arabia*,³⁵ plaintiff brought an action arising from injuries allegedly inflicted by agents of the Saudi Arabian government in retaliation for his reporting of safety violations while he was employed at a Saudi hospital. The Eleventh Circuit held that plaintiff's action had a sufficient nexus with Saudi Arabia's commercial activity in the United States in that plaintiff had been recruited in the United States to monitor compliance with safety regulations in the hospital. Plaintiff's "detention and torture [were] so intertwined with his em-

³¹ 626 F.2d 270 (3d Cir. 1980).

³² *Id.* at 273.

³³ 822 F.2d 11 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987).

³⁴ *Id.* at 13.

³⁵ 923 F.2d 1528 (11th Cir. 1991), *rev'd*, 61 U.S.L.W. 4253 (U.S. Mar. 23, 1993).

ployment at the Hospital that they [were] 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia."³⁶ The United States Supreme Court reversed, stating that "where a claim rests entirely upon activities sovereign in character, as here . . . , jurisdiction will not exist under that clause [§ 1605(a)(2)] regardless of any connections the sovereign acts may have with commercial activity."³⁷ Thus, the court did not address the nexus test, which would be used when a claim rests on both commercial and sovereign elements.³⁸

Finally, in *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,³⁹ the Second Circuit Court of Appeals held that the commercial activity exception applied to a time charterer's claim for loss of the use of a vessel that resulted from Egypt's delay in unloading the vessel's cargo of wheat at an Egyptian port. The court held that the FSIA withdraws immunity for claims based upon acts outside the United States that "comprise an integral part of the state's 'regular course of commercial conduct'" in the United States.⁴⁰ Characterized in such fashion, the court held that it had jurisdiction over a claim, which, it noted, was based upon Egypt's purchase of wheat in the United States and its transportation to Egypt, and not just on Egypt's misconduct in the course of unloading the vessel at the Egyptian port.⁴¹

In addition to the "nexus" test, one court has given the first commercial activity exception to sovereign immunity a broader interpretation, applying what has been called the "doing business" commercial activity test. In *In re Rio Grande Transport, Inc.*⁴² the court held that it had jurisdiction over a limitation action involving injury, death, and

³⁶ *Id.* at 1535.

³⁷ *Nelson v. Saudi Arabia*, 61 U.S.L.W. 4253, — n.4 (U.S. Mar. 23, 1993).

³⁸ *See id.*

³⁹ 708 F.2d 80 (2d Cir. 1983).

⁴⁰ *Id.* at 84 (citations omitted).

⁴¹ *Id.*

⁴² 516 F. Supp. 1155 (S.D.N.Y. 1981).

lost cargo claims arising out of a collision between a United States vessel and an Algerian state-owned vessel in the Mediterranean sea.⁴³ Even though the action involved an Algerian vessel that only operated between Europe and Algeria, the district court held that the action arose out of the regular course of Algeria's worldwide shipping activity involving seventy vessels and, as such, the action arose out of a regular course of commercial activity having substantial contact with the United States.⁴⁴ However, this "doing business" reading of the clause has not been followed by other courts.

b. An Action Based Upon an Act in the United States in Connection With Commercial Activity Elsewhere

The second commercial activity exception to foreign sovereign immunity provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."⁴⁵ As the drafters noted:

[e]xamples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States" as defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commer-

⁴³ *Id.* at 1162.

⁴⁴ *Id.*

⁴⁵ 28 U.S.C. § 1605(a)(2) (1988).

cial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.⁴⁶

In *Sugarman v. Aeromexico, Inc.*⁴⁷ and *Vencedora Oceancia Navigacion v. Compagnie Nationale Algerienne De Navigation*,⁴⁸ the Third and Fifth Circuits suggested that the second commercial activity exception to foreign sovereign immunity applies to actions based upon *misconduct* that takes place in the United States.⁴⁹ This view is supported in *Harris v. Vao Intourist, Moscow*,⁵⁰ where suit was brought against two Soviet state-owned tourist services to recover for the alleged wrongful death of a United States tourist in a fire at a Moscow hotel where he was a guest. Even though the tourist services engaged in substantial commercial activity in the United States, the court held that the action was not based upon an act in the United States in connection with commercial activity elsewhere since the negligent act causing the injuries did not occur in the United States.⁵¹ Additionally, in *Filus v. Lot Polish Airlines*,⁵² the Second Circuit Court of Appeals held that the failure of a foreign state-owned manufacturer to warn United States passengers of defective aircraft engines was not an allegation constituting an act performed in the United States such as to trigger this second commercial activity exception to the FSIA.⁵³

⁴⁶ HOUSE REPORT, *supra* note 4, at 6617-18.

⁴⁷ 626 F.2d 270 (3d Cir. 1980).

⁴⁸ 730 F.2d 195 (5th Cir. 1984).

⁴⁹ 626 F.2d at 273; 730 F.2d at 200-01.

⁵⁰ 481 F. Supp. 1056 (E.D.N.Y. 1979).

⁵¹ *Id.* at 1061.

⁵² 907 F.2d 1328 (2d Cir. 1990).

⁵³ *Id.* at 1333.

c. An Action Based Upon Commercial Activity Elsewhere Having a Direct Effect in the United States

The third commercial activity exception to foreign sovereign immunity provides:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.⁵⁴

The cases construing this exception hold that a personal injury suffered abroad does not cause a "direct effect in the United States," even though it causes the injured person or a decedent's personal representative damages in the form of physical suffering, medical expenses, or economic loss in the United States.⁵⁵ However, property damage cases fare better in United States courts. In *In re Rio Grande Transport, Inc.*⁵⁶ the collision of an American vessel with an Algerian vessel in the Mediterranean Sea

⁵⁴ 28 U.S.C. § 1605(a)(2) (1988).

⁵⁵ See, e.g., *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979) (finding no direct effect in wrongful death and personal injury actions brought by Americans when the causes of action arose from the collapse of a roof at an airport terminal building in Iran). *In re Disaster in Riyadh Airport, Saudi Arabia*, on August 19, 1980, Av. Cas. (CCH) 17,880, 17,882 (D.D.C. 1981) (finding no direct effect in wrongful death actions arising from injuries received on a flight between two Saudi Arabian cities); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 419 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (finding no direct effect in a wrongful death action brought by an American arising from exposure to radioactive material in Mexico); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Ct.*, 859 F.2d 1354, 1360 (9th Cir. 1988) (finding no direct effect in 69 actions brought by Mexican decedents' estates arising from injuries sustained in a crash on a flight wholly within Mexico); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1065-66 (E.D.N.Y. 1979) (finding no direct effect in a wrongful death action arising from injuries sustained by an American tourist in a Moscow hotel); *Kramer v. Boeing Co.*, 705 F. Supp. 1392 (D. Minn. 1989) (finding no direct effect in a personal injury action arising from injuries sustained in an engine fire on a flight in the Republic of Cameroon). These cases hold that the physical suffering and economic loss in the United States resulting from an injury abroad is indirect and fortuitous depending on where the injured person or his/her representative might thereafter incur damage.

⁵⁶ 516 F. Supp. 1155, 1163 (S.D.N.Y. 1981).

had a direct effect in the United States because the American vessel was the sole source of income of its American corporate owner.

3. *The Non-Commercial Tort Exception*

The non-commercial tort exception to foreign sovereign immunity provides:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or⁵⁷

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.⁵⁸

The United States Supreme Court has held that this non-commercial tort exception only applies to injury or property damage that occurs within the United States.⁵⁹ Therefore, Argentina was immune in an action for damage to a crude oil tanker resulting from a military attack by the Argentine military during the Falklands war.⁶⁰ In *Olsen v. Government of Mexico*,⁶¹ however, the Ninth Circuit held that the district court had subject matter jurisdiction under this section over a wrongful death action brought

⁵⁷ The discretionary act function exception in this clause is generally analyzed under the principles developed pursuant to the Federal Tort Claims Act. *Joseph v. Consulate Gen. of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

⁵⁸ 28 U.S.C. § 1605(a)(5) (1988).

⁵⁹ *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439-40 (1989).

⁶⁰ *Id.*

⁶¹ 729 F.2d 641 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984).

by United States citizens arising from the crash in the United States of an aircraft alleged to have been negligently operated by the Mexican government.⁶²

4. *Exception as to Counterclaims*

A foreign state is not accorded sovereign immunity with respect to certain counterclaims,⁶³ as follows:

[i]n any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.⁶⁴

In *In re Oil Spill by "Amoco Cadiz" off the Coast of France*⁶⁵ the court held that claims by the Republic of France alleging negligent operation of an oil tanker by an oil company, and the oil company's counterclaims of negligence by the Republic of France for failing to take preventive steps to avoid the oil spill and in negligently implementing cleanup efforts, arose out of the same "transaction or occurrence" so as to withdraw sovereign immunity as to the oil company's counterclaims against France under this section and under Federal Rule of Civil Procedure 13.⁶⁶

Cross-claims are similarly treated. In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*⁶⁷ a suit for cargo damage was brought by Egypt's Ministry of Supply, a "foreign state" under the FSIA, against the corporate owner of an American vessel. A time charterer intervened and filed a

⁶² *Id.* at 645.

⁶³ 28 U.S.C. § 1607 (1988).

⁶⁴ *Id.*

⁶⁵ 491 F. Supp. 161 (N.D. Ill. 1979).

⁶⁶ *Id.* at 168.

⁶⁷ 708 F.2d 80 (2d Cir. 1983).

cross-claim against the Egyptian agency for lost use of the vessel during the period that Egypt delayed the unloading of the cargo. Even though it was not a "counterclaim," the Second Circuit Court of Appeals held that the court had jurisdiction over the cross-claim because it came under one of the commercial activity exceptions to immunity and it met the test of Federal Rule of Civil Procedure 13(g), as it arose from "the same transaction or occurrence" as Egypt's claim for damaged cargo.⁶⁸

B. THE FEDERAL RULES OF PROCEDURE GOVERNING JOINDER OF PARTIES

In addition to these substantive considerations, the applicable rules of civil procedure supply additional constraints on the joinder of a foreign state. The Federal Rules of Civil Procedure, however, provide for the liberal joinder of parties and claims. Federal Rule of Civil Procedure 20 provides:

[a]ll persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences or if any questions of law or fact common to all defendants will arise in the action.⁶⁹

There seems to be little dispute that a claim arising out of an air crash and asserted jointly or alternatively against the air carrier, the aircraft or part manufacturer, and the flight crew, is one that arises out of the same "transaction or occurrence" so as to permit the joinder of all entities contributing to the negligent manufacture, operation and maintenance of the aircraft.⁷⁰

⁶⁸ *Id.* at 85.

⁶⁹ FED. R. CIV. P. 20.

⁷⁰ *See, e.g.,* *Compania Mexicana De Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1357 (9th Cir. 1988) (wrongful death action arising out of air crash brought, inter alia, against air carrier and aircraft manufacturer); *Keller v. Transportes Aereos Militares Ecuatorianos*, 601 F. Supp. 787 (D.D.C. 1985) (wrongful death action arising out of air crash brought against aircraft's owner and operator).

Similarly, Federal Rule of Civil Procedure 14 allows a defendant to bring suit against a third-party "who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim."⁷¹ Therefore, a defendant as third-party plaintiff can implead a foreign state into litigation in a United States court if, for example, the party can state a claim for indemnity or contribution and the third-party plaintiff's claim falls within one of the FSIA exceptions to foreign sovereign immunity.

For example, in *In re Oil Spill by "Amoco Cadiz" off the Coast of France*,⁷² claims arising from an oil spill were filed against the Amoco International Oil Co. and others. Defendant Amoco filed third-party claims against the Republic of France and its various departments seeking indemnity and contribution alleging that the Republic of France negligently failed to implement an effective oil spill contingency plan, failed to take initiatives to prevent such accidents, and negligently performed clean-up efforts. The court held that Amoco had sufficiently alleged elements of duty, breach, causation, and damages, and that, therefore, Amoco had stated cognizable causes of action for contribution and indemnity and could implead the Republic of France to directly defend against the claims filed against Amoco.⁷³

Claimants risk dismissal of their claims, however, if the joinder requirements of the Federal Rules are not met. In *Campbell v. Commonwealth of Australia*⁷⁴ plaintiff filed suit in California state court against the Australian government alleging that he had been wrongfully terminated from his employment in Australia's United States Trade Office. The action was removed pursuant to the FSIA removal statute. When the court prevented plaintiff from serving interrogatories on seventeen non-party Australian officials, on the basis that interrogatories can only be served

⁷¹ FED. R. CIV. P. 14.

⁷² 491 F. Supp. 161 (N.D. Ill. 1979).

⁷³ *Id.* at 168-69.

⁷⁴ 912 F.2d 468 (9th Cir. 1990) (unpublished disposition).

on parties, he then sought leave to amend his complaint to join those officials for the purpose of serving interrogatories. The Ninth Circuit, however, upheld the district court's dismissal of the claims on the basis that the joinder requirements of Federal Rule of Civil Procedure 20, requiring that a plaintiff be able to state a claim against the party to be joined, were not met.⁷⁵

IV. NONJOINER

Congress has conferred broad federal subject matter jurisdiction to the federal courts over actions determining the liability of foreign states.⁷⁶ Therefore, the FSIA is an exception to the rule that removal statutes are to be narrowly construed.⁷⁷ In fact, the FSIA removes the entire action including not only the claim asserted against the foreign state, but also all other claims asserted against private and domestic defendants.⁷⁸ After removal to federal court, defendants can request that the action be dismissed pursuant to the federal forum non conveniens standard, unavailable in some state courts.⁷⁹

As will be seen below, the combined effects of the FSIA's liberal removal provisions and the recent developments in the doctrine of forum non conveniens have resulted in the "nonjoinder" of a potentially culpable foreign state defendant in actions brought by foreign plaintiffs in United States courts. This nonjoinder by plaintiffs has given rise to the joinder of a foreign state by means of third-party claims and the subsequent removal of the entire action by that third-party defendant. Although commentators have noted that in the past,

⁷⁵ *Id.*

⁷⁶ Kathleen M. Keith, Note, *Removal Under the Foreign Sovereign Immunities Act of 1976*, Nolan v. Boeing Co., 919 F.2d 1058 (5th Cir. 1990), 15 SUFFOLK TRANS-NAT'L L.J. 868 (1992).

⁷⁷ See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).

⁷⁸ *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); see *infra* notes 84-94 and accompanying text.

⁷⁹ *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir.), *cert. denied*, 59 U.S. 3701 (1990); see *infra* notes 103-11 and accompanying text.

courts would sever and remand the main claims and only retain jurisdiction over the third-party claims against the foreign state,⁸⁰ recent cases have held that the FSIA's super-removal provisions permit the removal of an entire action by a third-party foreign state defendant.⁸¹ Therefore, a forum non conveniens dismissal of first-party as well as third-party claims is available even when plaintiffs do not join a foreign defendant in the action.

A. THE FSIA SUPER-REMOVAL STATUTE

To promote the uniformity of decision by encouraging the bringing of actions involving foreign states in federal court, the FSIA broadened the subject matter jurisdiction of the district courts to include such actions, omitted a jurisdictional amount, provided for strong removal authority, and omitted the right to trial by jury. As the drafters noted: "[s]uch broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."⁸² The Act's emphasis on federal court jurisdiction over actions against foreign states is evident in the broad removal provisions prescribed by 28 U.S.C. § 1441(d), which states:

[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.⁸³

⁸⁰ Carol K. Young, *Defending Litigation Against a Foreign Airline Under the Foreign Sovereign Immunities Act*, 51 J. AIR L. & COM., 461, 486 (1986).

⁸¹ See *Nolan*, 919 F.2d at 1061-62; *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992).

⁸² HOUSE REPORT, *supra* note 4, at 6611-12.

⁸³ 28 U.S.C. § 1441(d) (1988).

As the FSIA drafters noted:

[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.⁸⁴

The United States Supreme Court has recognized that this right of removal is necessarily broad and encompassing. This construction is in keeping with the congressional intent to avoid inconsistent results and conflicting adjudications in those particularly sensitive cases in which the United States courts determine the possible culpable conduct of foreign states:

Congress, pursuant to its unquestioned Art. I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States.⁸⁵

Moreover, in *Arango v. Guzman Travel Advisors Corp.*,⁸⁶ the Fifth Circuit Court of Appeals held that a foreign state defendant in a multi-party suit, removing an action pursuant to § 1441(d), removes the *entire* action, including claims against private co-defendants.⁸⁷ In that case, suit was brought by vacationers who were detained by employees of the Dominican Republic's national airline and denied entry into the country as "undesirable aliens" by officials of the Dominican government. Plaintiffs brought

⁸⁴ HOUSE REPORT, *supra* note 4, at 6631.

⁸⁵ *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-87 (1983).

⁸⁶ 621 F.2d 1371 (5th Cir. 1980).

⁸⁷ *Id.* at 1377.

suit against the airline, an FSIA "foreign state," and against the hotel, travel agent and the tour organizer, who collaborated in the marketing of the package tour. In concluding that the FSIA conferred broad removal authority over the nonfederal claims asserted against the domestic defendants, the *Arango* court noted the Act's legislative history:

[t]he Report of the House Judiciary Committee in its section-by-section analysis of the FSIA, states that "[n]ew subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, *even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.*"⁸⁸

The court noted that the FSIA removal statute provides for the removal of "civil actions" and not simply the "claims" involving the foreign state defendant, and thus, sanctions the super-removal authority.⁸⁹ Moreover, it was consistent with the general rule that the scope of removal under other removal statutes is related to the extent of the federal court's pendent jurisdiction.⁹⁰ Finally, the court held the exercise of subject matter jurisdiction was sanctioned by the United States Constitution.⁹¹ Article III, section 2, which outlines the "outer limits" of federal subject matter jurisdiction, merely requires minimal diversity, an element satisfied in the *Arango* case.⁹²

In a subsequent decision, *Teledyne, Inc. v. Kone Corp.*,⁹³ the Ninth Circuit faced the same question decided in *Arango*, but addressed the issue in the context of an al-

⁸⁸ *Id.* at 1375 (emphasis added) (citing H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 32, reprinted in 1976 U.S.C.C.A.N. 6604, 6631).

⁸⁹ 621 F.2d at 1376.

⁹⁰ *Id.*

⁹¹ *Id.* at 1377 n.7. As the United States Supreme Court noted with regards to the concept of minimal diversity, as the "outer limits" of federal diversity jurisdiction: "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967).

⁹² *Id.*

⁹³ 892 F.2d 1404 (9th Cir. 1989).

tered constitutional landscape. In *Finley v. United States*⁹⁴ the United States Supreme Court held that federal subject matter jurisdiction does *not* extend to pendent party claims in the absence of clear statutory authority.⁹⁵ Since the scope of removal is related to the existence of pendent party jurisdiction, the *Teledyne* court analyzed whether the FSIA conferred such jurisdiction. However, like *Arango*, the Ninth Circuit reviewed the FSIA's legislative history and, noting that section "1441(d) expresses an intention to give sovereign foreign defendants an absolute right to a federal forum coupled with an unusually strong preference for the consolidation of claims," the court concluded that the FSIA authorized pendent party jurisdiction and that, consequently, the FSIA removal by a foreign state removes the entire action, where minimal diversity exists.⁹⁶

B. FORUM NON CONVENIENS: STATE VS. FEDERAL STANDARDS

Another factor leading to the nonjoinder of a foreign state in international air crash litigation is the disparity between federal and state forum non conveniens standards.⁹⁷ In *Gulf Oil Corp. v. Gilbert*,⁹⁸ the United States

⁹⁴ 490 U.S. 545 (1989).

⁹⁵ *Id.* at 554.

⁹⁶ 892 F.2d at 1409.

⁹⁷ Under the doctrine of forum non conveniens, a trial court may "decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interest of justice indicate that the action should be tried in another forum." *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985). In federal courts, the doctrine derives from the court's inherent power, under Article III of the Constitution, "to control the administration of the litigation before it" and to address "whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum." *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 530 (1947).

The United States Supreme Court has stated:

The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to

Supreme Court established a flexible standard pursuant to which a trial court can dismiss an action brought in an inconvenient forum.⁹⁹ In *Piper Aircraft Co. v. Reyno*,¹⁰⁰ the Court held that, although plaintiff's initial forum choice is normally to be given considerable weight, this presumption applies with less force when the plaintiffs are for-

pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

⁹⁸ 330 U.S. 501 (1947).

⁹⁹ In *Gilbert*, plaintiff operated a public warehouse in Lynchburg, Virginia, which burned due to the defendant's alleged negligence. Plaintiff brought suit in the United States Southern District Court of New York, against a Pennsylvania corporation doing business in Virginia and New York. The Supreme Court upheld the dismissal even though venue in New York was proper, because plaintiff and most of the witnesses lived there, the defendant did business there, and all of the events concerning the litigation took place in Virginia. *Id.* at 510-13.

In formulating the basic forum non conveniens analysis, the *Gilbert* Court noted that the forum non conveniens doctrine "presupposes at least two forums in which the defendant is amenable to process." *Id.* at 506-07. The factors which the trial court must weigh in determining the more convenient of the two forums for the trial of the action include an analysis of the private interest of the litigants and the public interest of the court and the community. *Id.* at 508. The private interest factors are:

- (1) the relative ease of access to sources of proof,
- (2) the availability of compulsory process for the attendance of unwilling witnesses,
- (3) the cost of procuring willing witnesses,
- (4) the possibility of viewing the premises if appropriate to the case, and
- (5) all other practical problems that make the trial of the case easy, expeditious and inexpensive.

Id.

The public interest factors consist of:

- (1) the court's administrative difficulties if litigation proceeds in a congested court instead of proceeding in a forum with a closer tie to the litigation,
- (2) the burden of jury duty on a community with no relation to the case,
- (3) the local interest of the forum in deciding a case of local import, and
- (4) the avoidance of unnecessary problems in conflict of laws, or the application of foreign law.

Id. at 508-09.

¹⁰⁰ 454 U.S. 235 (1981).

eign.¹⁰¹ The test in *Gilbert*, as refined in *Reyno*, is now routinely invoked in forum non conveniens dismissals of foreign tort claims brought by foreign citizens in American courts.¹⁰²

Unless the *Gilbert-Reyno* test has been incorporated into state law, however, the test only applies in federal court.¹⁰³ Consequently, plaintiffs desiring to have their foreign tort claims heard by United States juries have been known to file suit in the *state* courts of those states that do not recognize or strictly limit the trial court's discretion to dismiss a case on the basis of forum non con-

¹⁰¹ In *Reyno*, plaintiffs were representatives of citizens and residents of Scotland who were killed in an air crash in Scotland. They brought suit in the United States against American manufacturers of the airplane and of the plane's propellers. The fact that the two manufacturers both resided in the United States and that the court had jurisdiction over the defendants did not defeat a forum non conveniens dismissal. The Supreme Court, applying the *Gilbert* factors, held Scotland to be the appropriate forum for the litigation of the cases because the airplane was owned and operated by a company organized in the United Kingdom, all the decedents' heirs and next of kin were Scottish subjects and citizens, the investigation of the accident was conducted by British authorities, and few evidentiary problems would arise if the trial were held in Scotland since a large proportion of the relevant evidence was located there. *Id.* at 257-61. In so holding the Supreme Court stated:

[w]hen the home forum has been chosen [by the plaintiff], it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Id. at 255-56. The Court noted the consequences of according deferential treatment to a foreign plaintiff's forum choice:

The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

Id. at 252; see also *Rubenstein v. Piper Aircraft, Corp.*, 587 F. Supp. 460, 462 (S.D. Fla. 1984) (refusing to hear a case brought by a foreign plaintiff in an American court solely to increase the chances or rewards of victory).

¹⁰² See, e.g., *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1519-20 (11th Cir. 1985) (applying test established in *Reyno* to uphold lower court's dismissal on grounds of forum non conveniens).

¹⁰³ See, e.g., *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978) (restricting the application of forum non conveniens under Florida law to cases in which both parties to the lawsuit reside outside of Florida and the cause of action arose outside Florida).

veniens.¹⁰⁴ To avoid removal on the basis of diversity, the plaintiffs will only join nondiverse parties who are often agents or joint venturers of the foreign state. Additionally, plaintiffs will selectively fail to join the culpable foreign state to avoid removal to federal court under the FSIA's liberal removal provisions.

C. *NOLAN V. BOEING CO.*

The decision in *Nolan v. Boeing Co.*¹⁰⁵ dealt a serious setback to the strategy by which foreign claimants bring suit in state court and selectively sue only those defendants whose presence prevents removal. In that case, wrongful death claims were brought in Louisiana state court arising from the crash in the United Kingdom of a Boeing 737-400 aircraft, operated by British Midland Airways. No American citizens were among those injured or killed. Nonetheless, the foreign claimants brought suit in the United States through two American attorneys who were appointed administrators, curators, and/or tutors of the 225 foreign citizens injured or killed in the crash. Plaintiffs sued The Boeing Company (Boeing), which manufactured the aircraft, General Electric Company (GE) and CFM International, Inc. (CFMI), which jointly manufactured and sold the engines. Although engine malfunction was one alleged cause of the crash, plaintiffs failed to join Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. (SNECMA), a commercial entity owned by the French government, which manufactured the allegedly malfunctioning aircraft engines in a joint venture with GE.

Defendants first attempted to remove the actions to the

¹⁰⁴ The District of Columbia and over 40 states have recognized the doctrine of forum non conveniens, although some of these states severely restrict the doctrine's application. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 703 n.n.5,6 (Tex. 1990) (Hecht, J. dissenting), *cert. denied*, 498 U.S. 1024 (1991); see e.g., *Houston v. Caldwell*, 359 So. 2d 858, 859 (Fla. 1978) (holding that the doctrine was applicable only where the action does not involve Florida residents and it accrues outside the state).

¹⁰⁵ 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 59 U.S. 3701 (1991).

district court for the Eastern District of Louisiana on the basis of diversity jurisdiction. Defendant, Boeing, was a Delaware corporation with its principal place of business in Washington; CFMI was a Delaware corporation with its principal place of business in Ohio; and GE was a New York corporation with its principal place of business in New York. The plaintiffs were nondiverse citizens and residents of New York and Washington. Consequently, because the law, at the time, recognized only the citizenship of the plaintiffs' appointed representative for diversity purposes, the trial court properly remanded the cases for lack of complete diversity.¹⁰⁶

Back in state court, defendant Boeing filed a third-party complaint against SNECMA, a "foreign state" under the FSIA.¹⁰⁷ SNECMA removed the original and third-party claims to federal court. Plaintiffs moved to remand arguing that the removal only removed the third-party and not plaintiffs' original claims against the first-party defendants.¹⁰⁸ Citing *Arango*, however, the district court held that the FSIA removal removed the entire action, including the first and third-party claims.¹⁰⁹ Subsequently, the

¹⁰⁶ *Id.* One week after the removal the amendment to 28 U.S.C. § 1332 became effective, providing that the citizenship of the represented party controls for purposes of diversity. *Id.* at 1061 n.3.

¹⁰⁷ The FSIA defines a foreign state as follows:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) an "agency or instrumentality of a foreign state" means any entity-

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a)-(b) (1988).

¹⁰⁸ *Nolan*, 919 F.2d at 1061-62.

¹⁰⁹ At that time, the district courts which had addressed the issue had concluded that a third-party removal by a foreign state pursuant to § 1441(d) removed only

federal trial court dismissed the actions on the basis of forum non conveniens.¹¹⁰

In upholding the trial court, the Fifth Circuit rejected plaintiffs' argument that the first-party claims should be remanded because the district court lacked pendent party jurisdiction over them. The court noted that Article III, section 2 of the United States Constitution only requires minimal diversity between the parties, a requirement which was satisfied in the case.¹¹¹ Moreover, the court concluded that, "[i]n view of the potential sensitivity of actions against foreign states . . . [giving] foreign states clear authority to remove to a federal forum actions brought against them in state courts . . . ,” the FSIA should be broadly construed to permit removal of the entire action and to confer pendent party jurisdiction, where minimal diversity exists, over the nonfederal first-party claims.¹¹² The Fifth Circuit, in effect, declared that the federal policy favoring uniformity of decision and removal in actions involving foreign states is not circumvented in cases where plaintiffs selectively sue only domestic defendants and then wait for one of them to implead the third-party foreign state. The court stated:

[c]ontrary to appellants' position, we can perceive no significant distinction between the authorization for removal of an entire action by a sovereign co-defendant, and removal of an entire action by a sovereign third-party defendant. In fact, the interest of a sovereign third-party defendant in removing the entire case may be more compelling, because its liability is logically dependent on the liability of a defendant in the main action. To protect itself fully, a third-party defendant like SNECMA could be called on to assert defenses on behalf of Boeing. The out-

the third-party but not the first party claims. See *Filho v. Pozos Int'l Drilling Servs., Inc.*, 662 F. Supp. 94 (S.D. Tex. 1987); *Laughlin v. Dow Chem. Co.*, 563 F. Supp. 271 (S.D. Tex. 1983); *Alifieris v. American Airlines, Inc.*, 523 F. Supp. 1189 (E.D.N.Y. 1981).

¹¹⁰ *Nolan*, 919 F.2d at 1061-62.

¹¹¹ *Id.* at 1063.

¹¹² *Id.* at 1065.

come of the main suit very much affects SNECMA's rights.¹¹³

D. *IN RE SURINAM AIRWAYS HOLDING CO.*

A similar strategy was employed in consolidated cases arising out of the June 7, 1989 crash of a Surinam Airways flight from Amsterdam, the Netherlands, to Paramaribo, Surinam in South America.¹¹⁴ Several passengers, all citizens of either the Netherlands or Surinam, filed personal injury and wrongful death actions in Florida state court naming the following as defendants: (1) the registered owner of the aircraft; (2) a company holding a mortgage interest in the plane; (3) a company performing turn-around maintenance on the aircraft; (4) the company providing the cockpit crew; and (5) the estates of the pilot, co-pilot, and flight engineer.¹¹⁵

The passengers did not sue Surinam Airways, the air carrier and a "foreign state" under the FSIA. However, one of the defendants, Air Crews International, which provided the cockpit crew to the air carrier, filed a third-party complaint against Surinam Airways for indemnity, contribution and breach of the cockpit crew contract.¹¹⁶ Air Crews alleged that the airline breached the contract by failing to operate the aircraft in accordance with applicable regulations and by not providing insurance in favor of Air Crews for the crews provided. Surinam Airways subsequently removed the entire action pursuant to the FSIA, among other bases.¹¹⁷

¹¹³ *Id.* (citations omitted).

¹¹⁴ See *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992); *Tauwnaar v. Surinam Airways Holding Co.*, No. 91-1558-CIV-RYSKAMP (S.D. Fla. 1991) (Notice of Removal).

¹¹⁵ *In re Surinam Airways Holding Co.*, 974 F.2d at 1256 n.1.

¹¹⁶ *Id.* at 1256.

¹¹⁷ Although plaintiffs only pled state law causes of action, the defendants and third-party defendants also removed the actions pursuant to the federal question removal statute, arguing that both the first and third-party claims arose under the exclusive federal cause of action created by a United States treaty which governs passenger injury and death claims arising out of international air transportation. See Convention for the Unification of Certain Rules Relating to International

In response to plaintiffs' motion to remand, the district court retained jurisdiction over only the third-party claims and remanded the first-party claims that had not been brought against any foreign state defendant. The court first narrowly construed the language of 28 U.S.C. § 1330(a), which confers jurisdiction over "civil action[s] against a foreign state," to extend jurisdiction only over those claims brought directly against a foreign state. Then the court held that, although it possessed "supplemental" jurisdiction over the main claims pursuant to 28 U.S.C. § 1367(c), it declined to exercise that jurisdiction finding that the state law issues predominated in the main claims.

The Eleventh Circuit Court of Appeals, however, reversed the district court's order of partial remand.¹¹⁸ The court held that the FSIA conferred subject matter jurisdiction over both the first-party and third-party claims.¹¹⁹ It noted the congressional language expressly granting a foreign state's right to remove not only those claims that are brought against a foreign state but also those related claims in the action that are brought against private entities.¹²⁰ Therefore, the Court held that such a right of removal was equally conferred where third-party contribution and indemnity claims were brought against a foreign state.¹²¹ Otherwise, the congressional intent to provide for a federal determination of all claims upon

Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), *reprinted in* note following 49 U.S.C. § 1502 (1970) (Warsaw Convention).

However, the district court held that the Warsaw Convention did not create the exclusive cause of action for plaintiffs' state law claims. Therefore, for removal purposes, the complaint did not arise under federal law under the complete preemption exception to the well-pleaded complaint rule. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

In reversing the district court on other grounds, the Eleventh Circuit Court of Appeals found it unnecessary to determine whether the case was properly removed pursuant to the federal question removal statute. *In re Surinam Airways Holding Co.*, 974 F.2d at 1258 n.7.

¹¹⁸ *In re Surinam Airways Holdings Co.*, 974 F.2d at 1260-61.

¹¹⁹ *Id.* at 1260.

¹²⁰ *Id.*

¹²¹ *Id.*

which the foreign state's third-party liability directly depended would be frustrated.¹²² The court further held that, once a third-party foreign state removes the entire action under the FSIA, the district court lacks the discretion to remand the related first-party claims.¹²³

E. THE JUDICIAL IMPROVEMENTS ACT OF 1990

Since the scope of an FSIA removal is related to the concept of pendent party jurisdiction,¹²⁴ recent changes in the pendent party doctrine are worth noting.

In reaction to *Finley v. United States*,¹²⁵ which held that federal subject matter jurisdiction does not extend to pendent party claims unless provided by statute,¹²⁶ Congress enacted the Judicial Improvements Act of 1990 (the Act).¹²⁷ Title III, section 310 of the Act replaces the concepts of pendent party and pendent claim jurisdiction with a single "supplemental" jurisdiction.¹²⁸ The Act pro-

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375-76 (5th Cir. 1980).

¹²⁵ 490 U.S. 545 (1989).

¹²⁶ *Id.* at 554.

¹²⁷ Pub. L. No. 101-650, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367 (Supp. II 1990)).

¹²⁸ Section 310 (codified at 28 U.S.C. § 1367 (Supp. II 1990)), provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims

vides that, subject to specific exceptions, in any civil action where the district courts have original jurisdiction over some claim, the court shall have supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."¹²⁹ Moreover, such supplemental jurisdiction includes "claims that involve the joinder or intervention of additional parties."¹³⁰

The legislative history of these amendments indicates that Congress intended to legislatively overrule *Finley's*¹³¹ presumption that pendent party jurisdiction is not congressionally authorized and replace it with the presumption that it is always authorized, unless expressly excepted.¹³² Congress has thus clarified that pendent

would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under section (1) if —

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id.

¹²⁹ 28 U.S.C. § 1367(a). This supplemental jurisdiction is subject to statutory exceptions, for example, certain claims in diversity cases. *Id.* § 1367(b)-(c).

¹³⁰ 28 U.S.C. § 1367(a) (emphasis added).

¹³¹ 490 U.S. 545 (1989).

¹³² As reported in United States Law Week:

Section 310 codifies the concepts of pendent and ancillary jurisdiction under a new label called "supplemental jurisdiction" and effectively overrules *Finley v. U.S.*, 490 U.S. 545 (1989).

As a result of *Finley*, some lower courts have declined to exercise jurisdiction in formerly unquestioned circumstances involving joinder and intervention.

Congress has now stepped in with Section 310, which will appear at 28 U.S.C. § 1367. In federal question cases, Section 1367(a) broadly authorizes district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder or intervention of additional parties. These supplemental claims must, under the new statute, be "so related to claims in the action with

party or supplemental jurisdiction potentially extends to all "constitutional cases" as defined in *United Mine Workers v. Gibbs*,¹³³ i.e., all cases arising from a "common nucleus of operative fact."¹³⁴

The decision in *Colgan v. Port Authority*¹³⁵ is instructive. In that case, plaintiff brought a personal injury action against the Port Authority, Lodige Air Cargo Systems, and Lufthansa German Airlines, the latter a foreign state under the FSIA. Lufthansa removed the action pursuant to the FSIA's removal provisions, and plaintiff moved to remand. In denying the motion, the court noted that the action was properly removed and that it not only had pendent party jurisdiction over the nonfederal claims against the domestic defendants under *Nolan* and *Teledyne*, but that it also had supplemental jurisdiction over those claims under the Judicial Improvements Act of 1990.¹³⁶

Other courts construing the Judicial Improvements Act of 1990, in the context of air crash litigation, may approach the issue in a way similar to the Third Circuit in *Sinclair v. Soniform, Inc.*,¹³⁷ a decision involving an analogous personal injury claim. In that case, a scuba diver brought suit for injuries received when his buoyancy compensator vest malfunctioned and caused him to ascend from a dive too rapidly. Plaintiff sued the manufacturer of the vest and the crew of the vessel for their failure to detect his symptoms and render medical care. The court held that the claims against the crew fell under the district court's admiralty jurisdiction and that the claims against

such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (Supp. II 1990). This provision codifies the scope of supplemental jurisdiction first articulated in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and explicitly fills the statutory gap noted in *Finley*.

Legislation: Mixed Bag of Changes Designed to Improve Federal Practice, 59 U.S.L.W. at 2419 (Jan. 15, 1991).

¹³³ 383 U.S. 715 (1966).

¹³⁴ *Id.* at 725.

¹³⁵ No. 91-CV-1136, 1991 WL 180384 (E.D.N.Y. Aug. 14, 1991).

¹³⁶ *Id.* at *3-4.

¹³⁷ 935 F.2d 599 (3d Cir. 1991).

the manufacturers were supported by the federal court's supplemental jurisdiction.¹³⁸ In so holding, the Third Circuit stated:

[r]ecently, Congress codified the existence of supplemental jurisdiction in 28 U.S.C. § 1367(a) (West Supp. 1991): "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder . . . of additional parties." Claims are part of the same constitutional case if they "derive from a common nucleus of operative fact," and "are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding"

Sinclair's claims against the crew and his claims against the manufacturers did arise from a common nucleus of operative fact. Both sets of claims are based on the same purported injuries stemming from the same scuba diving incident. Those injuries were allegedly caused by the negligence of both the crew and the manufacturer. Accordingly, we find that Sinclair's claims against the manufacturers fall within the district court's supplemental jurisdiction.¹³⁹

In addition to delineating the court's supplemental jurisdiction, however, the Judicial Improvements Act of 1990¹⁴⁰ also outlines when claims should be remanded.¹⁴¹ For example, when an action is removed on the basis of diversity, there is no supplemental jurisdiction over related non-federal claims when the exercise of such jurisdiction would be contrary to the requirements of the diversity jurisdiction statute.¹⁴²

¹³⁸ *Id.* at 602-03.

¹³⁹ *Id.* at 603 (citations omitted) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

¹⁴⁰ 28 U.S.C. § 1367 (Supp. II 1990).

¹⁴¹ *Id.* § 1367(c).

¹⁴² *Id.* § 1367(b).

Moreover, § 1367(c) permits the court to remand nonfederal claims which raise novel issues of state law, or cases in which the district court has dismissed all claims over which it has original jurisdiction.¹⁴³ For example, in *Seal v. University of Pittsburgh*,¹⁴⁴ a federal question removal case, the court, after dismissing a federal civil rights claim, held that it would remand state law wrongful discharge claims since "none of the remaining claims . . . [touch upon] federal policy . . . [T]hese claims embrace unclear and unique issues of law of a particular interest to Pennsylvania which are better left to the attention of the Commonwealth's appellate courts."¹⁴⁵

However, because the federal forum is favored in actions involving a foreign state, this discretion to remand should be exercised less frequently in FSIA cases. The Eleventh Circuit Court of Appeals in *In re Surinam Airways Holding Co.*¹⁴⁶ held that the district court had no discretion to remand pendent party (supplemental) main claims once an entire action was removed by a third-party foreign state defendant pursuant to the FSIA.¹⁴⁷ Similarly, in *Colgan*, the court summarily declined to exercise its discretion under § 1367 to remand the domestic claims which had been removed by a foreign state pursuant to the FSIA.¹⁴⁸ And, in *Teledyne Inc. v. Kane Corp.*,¹⁴⁹ a case not decided under the Judicial Improvements Act, the Ninth Circuit approved of the district court's retention and subsequent dismissal of the pendent party claims against the private defendants, even after it dismissed the claims against the removing foreign state on the basis of immunity.¹⁵⁰ In a case which may suggest the approach other courts might take in other FSIA cases decided under the

¹⁴³ *Id.* § 1367(c).

¹⁴⁴ 766 F. Supp. 386 (W.D. Pa. 1991).

¹⁴⁵ *Id.* at 388.

¹⁴⁶ 974 F.2d 1255 (11th Cir. 1992).

¹⁴⁷ *Id.* at 1260.

¹⁴⁸ *Colgan v. Port Authority*, No. 91-CV-1136, 1991 WL 180384, at *1 (E.D.N.Y. Aug. 14, 1991).

¹⁴⁹ 892 F.2d 1404 (9th Cir. 1989).

¹⁵⁰ *Id.* at 1410 n.2.

Act, the *Teledyne* court held that such an exercise of pendent party jurisdiction is "particularly appropriate" where the adjudication involves a dismissal and therefore obviates an unnecessary trial, and where the dismissal of the pendent party claims are based on federal law.¹⁵¹

V. FRAUDULENT JOINDER

Because the FSIA confers federal question jurisdiction on federal courts,¹⁵² the concept of fraudulent joinder, which is most often implicated in diversity removals, does not arise in FSIA cases. The fraudulent joinder test, however, has been employed in cases involving foreign states and a claim of "collusive" joinder. By way of a preface to the discussion on collusive joinder, it is important to note the evolution of the fraudulent joinder test in cases involving diversity removal.

Removal on the basis of diversity is precluded where any defendant is a citizen of the state in which an action is brought.¹⁵³ Although joinder of a nondiverse defendant defeats removal, the citizenship of a fraudulently joined defendant is disregarded for the purpose of determining the propriety of removal on the basis of diversity.¹⁵⁴

¹⁵¹ *Id.* (quoting *Hagans v. Lavine*, 415 U.S. 528, 548 (1974)) (stating that "considerations favoring state adjudication are wholly irrelevant where the pendent claim is federal").

¹⁵² *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-93 (1983).

¹⁵³ 28 U.S.C. § 1441(a)-(b) (1988) provides:

[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*

Id. (emphasis added).

¹⁵⁴ *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989).

Therefore, a motion to dismiss a defendant on the basis of fraudulent joinder is most often asserted by a co-defendant wishing to dismiss the nondiverse party who is preventing the removal of the action.¹⁵⁵ As the key cases demonstrate, however, fraudulent joinder is only established where it is shown that the plaintiff cannot possibly state a cause of action against the nondiverse defendant or where the plaintiff has fraudulently pled jurisdictional facts.

The general "fraudulent joinder" test is illustrated in *Parks v. New York Times Co.*¹⁵⁶ The plaintiff in *Parks* brought a libel suit in Alabama state court against the New York Times, a non-resident, and four individual Alabama residents, who it claimed had endorsed the libel by failing to disavow the libelous statement. The New York Times removed the action to federal court on the basis that complete diversity existed between itself and the plaintiff. The defendant argued that the citizenship of the non-diverse defendants should be disregarded because they were fraudulently joined. The trial court agreed and denied plaintiff's motion to remand. In reversing the trial court, however, the Fifth Circuit Court of Appeals stated the test for fraudulent joinder as follows:

[W]e take the rule to be that there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard. One or the other at least would be required before it could be said that there was no real intention to get a joint judgment, and that there was no colorable ground for so claiming.¹⁵⁷

Therefore, finding that the plaintiff had stated a libel claim against the resident defendants, the court held that removal based on diversity was improper and that the

¹⁵⁵ *Id.*

¹⁵⁶ 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

¹⁵⁷ *Id.* at 478.

case should have been remanded.¹⁵⁸

Similarly, in *Cabalceta v. Standard Fruit Co.*,¹⁵⁹ the Eleventh Circuit stated:

[t]he test for determining whether or not a defendant has been fraudulently joined is twofold: (1) look to see whether there is no possibility the plaintiff can establish any cause of action against the resident defendant; and (2) look to see whether plaintiff has fraudulently pled jurisdictional facts in order to bring the resident defendant into state court.¹⁶⁰

Additionally, one commentator has noted that a recent Fifth Circuit case has made a fraudulent joinder removal easier by requiring the court to weigh the allegations in the pleadings, as well as the evidence in affidavits and depositions, to determine whether plaintiff could ultimately recover against the allegedly fraudulently joined defendant.¹⁶¹ As will be discussed below, the "fraudulent" joinder test is also applicable to cases involving a claim of "collusive" joinder.

¹⁵⁸ *Id.* at 479-81.

¹⁵⁹ 883 F.2d 1553 (11th Cir. 1989).

¹⁶⁰ *Id.* at 1561. Additionally, in international tort litigation, the fraudulent joinder test may require that the court determine whether the plaintiff has stated a claim against the nondiverse defendant under foreign law. In *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), Costa Rican citizens brought suit against various defendants in Florida state court arising from injuries allegedly sustained from exposure to harmful pesticides while plaintiffs were employed in defendant's plantation in Costa Rica. One of the defendants removed the action to federal court and moved to dismiss the nondiverse party on the basis of "fraudulent joinder." The trial court denied the plaintiffs' motion to remand, holding that the nondiverse defendant had been fraudulently joined because there was "no reasonable basis in fact or colorable ground supporting the claim against [it]." *Id.* at 836. The district court then dismissed the actions on the basis of forum non conveniens. *Id.* at 839.

However, in reversing the decision, the court of appeals noted that the district court partly based its forum non conveniens dismissal on the premise that the law of Costa Rica would govern in the actions. *Standard Fruit Co.*, 883 F.2d at 1562. Therefore, the court held that since Costa Rican law would apply, the district court erred in failing to evaluate the allegations of the complaint under Costa Rican law to determine whether a colorable claim could be stated against the nondiverse "fraudulently joined" defendant. *Id.*

¹⁶¹ See Allen B. Rich, *Current Issues in Removal Jurisdiction*, 57 J. AIR L. & COM. 395, 400-01 (1991).

VI. COLLUSIVE JOINDER

Whereas "fraudulent joinder" appears in cases where a party seeks to improperly *defeat* federal jurisdiction, the concept of "collusive joinder" appears in cases where a party seeks to improperly *create* it. Federal law, however, deprives the federal district court of subject matter jurisdiction in cases where a party has been collusively joined for the purpose of creating federal jurisdiction. Title 28 U.S.C. § 1359 provides:

[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.¹⁶²

Section 1359 was enacted to prevent the use of federal courts where the suit does not really and substantially involve a dispute or controversy properly within federal court jurisdiction.¹⁶³ Generally, cases involving a claim of collusive joinder manufacture diversity jurisdiction by either (1) the appointment of a diverse administrator or fiduciary acting on behalf of a nondiverse beneficiary, or (2) the illusory assignment of a claim to a diverse party solely for the purpose of permitting the real party in interest to collect an essentially state law claim in federal court.¹⁶⁴

In determining whether there has been collusion in the appointment of an administrator or fiduciary as plaintiff in personal injury litigation, courts analyze whether reasons exist for the appointment other than the creation of diversity of citizenship.¹⁶⁵ A key determinant in the analysis is the relationship between the administrator and the party

¹⁶² 28 U.S.C. § 1359 (1988).

¹⁶³ *Bishop v. Hendricks*, 495 F.2d 289, 293 (4th Cir.), *cert. denied*, 419 U.S. 1056 (1974).

¹⁶⁴ See *O'Brien v. Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969) (appointing out-of-state administrator to replace *resident* administrator for the sole avowed purpose of creating diversity to prosecute state law claim in federal court).

¹⁶⁵ *Bishop*, 495 F.2d at 292.

represented.¹⁶⁶ Therefore, in *Hackney v. Newman Memorial Hospital, Inc.*,¹⁶⁷ the appointment of the decedent's sister as administratrix in a wrongful death action was held not to be collusive where the sister was a statutory beneficiary and had a real, substantive interest in the action.¹⁶⁸

In *Gilbert v. Wills*¹⁶⁹ however, the Eleventh Circuit held that diversity had been collusively manufactured in a wrongful death suit filed in Florida.¹⁷⁰ In this case, the decedent's spouse, a diverse party with respect to the tortfeasors, entered into an agreement with decedent's nondiverse children. The children agreed not to exercise their statutory right to intervene in the suit, in exchange for a share in the surviving spouse's recovery.¹⁷¹

Section 1359, however, is not successfully raised in cases that involve neither an appointment nor an assignment. In *Nolan v. Boeing Co.*¹⁷² foreign plaintiffs brought wrongful death claims in Louisiana state court. Their claims arose out of an air crash in the United Kingdom, allegedly caused by a malfunctioning engine. One of the defendants, Boeing, filed third-party indemnity and contribution claims against the French state-owned engine manufacturer (SNECMA). The French company, a "foreign state," removed the actions under the FSIA. In the district court, the defendants and the third-party defendant then moved to dismiss the actions on the basis of the federal forum non conveniens standard.

Plaintiffs moved for leave to ascertain through discovery whether the third-party defendant had been collusively joined in order to facilitate removal of the actions to

¹⁶⁶ *Id.* at 294 n.24.

¹⁶⁷ 621 F.2d 1069 (10th Cir.), *cert. denied*, 449 U.S. 982 (1980).

¹⁶⁸ *Id.* at 1071.

¹⁶⁹ 834 F.2d 935 (11th Cir. 1987).

¹⁷⁰ *Id.* at 937.

¹⁷¹ Recent changes in the diversity jurisdiction statute may have eliminated the incentive to make collusive appointments in certain cases. Title 28 U.S.C. § 1332(c)(2) now provides that the legal representative of an estate, infant or incompetent shall be deemed to be a citizen of the state of the decedent, infant or incompetent, respectively.

¹⁷² 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991).

federal court and thus take advantage of the federal forum non conveniens standard. The Fifth Circuit affirmed the district court's denial of discovery, noting that Boeing had stated valid claims against the foreign state.¹⁷³ In dismissing the collusion charge, the court applied the "fraudulent joinder" standard, stating:

Appellants contend next that the district court committed error in dismissing these actions on forum non conveniens grounds without first allowing them to conduct discovery for purposes of proving collusion among the defendants to create federal subject matter jurisdiction. This is a frivolous argument.

Boeing has a substantial claim for contribution and indemnity against SNECMA, hence there is nothing contrived about the foundation for federal jurisdiction here. As the First Circuit recently observed, "parties may legitimately try to obtain the jurisdiction of federal courts, as long as they lawfully qualify under some of the grounds that allow access to this forum of limited jurisdiction." . . . Because the appellants offered no evidence that Boeing or SNECMA manufactured the jurisdictional facts necessary to remove this case to federal court pursuant to § 1441(d), the district court's denial of discovery was proper.¹⁷⁴

Similarly, in *In re Surinam Airway Holding Co.*,¹⁷⁵ a case in which the foreign state expressly *waived* its FSIA immunity, plaintiffs' collusion challenge to the joinder of and removal by the foreign state was wholly ignored by the Eleventh Circuit in its decision upholding the removal.¹⁷⁶

VII. CONCLUSION

Although the commercial activity and other exceptions to foreign sovereign immunity impose strict limits on the

¹⁷³ *Id.* at 1067.

¹⁷⁴ *Id.* at 1067-68 (citations omitted).

¹⁷⁵ 974 F.2d 1255 (11th Cir. 1992).

¹⁷⁶ The lower court's magistrate in *In re Surinam Airways Holding Co.*, dismissed plaintiffs' collusion argument, although it found the air carrier's waiver of immunity "ironic." United States Magistrate's Report and Recommendation, at 14.

joinder of foreign states in international tort litigation brought in United States courts, once successfully joined, a foreign state has a significant impact on the case. The Foreign Sovereign Immunities Act imposes few obstacles to the removal of a case to federal court. As long as one claim is properly asserted against a foreign state, the FSIA permits the removal of an entire action. The presence of a foreign state, therefore, effectively federalizes an action brought in state court and transports defendants to an often more hospitable forum in which to assert *forum non conveniens* and other defensive motions.

Comments

